BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF MARINE POWER AND EQUIPMENT COMPANY, INC., Appellant	PCHB No. 80-139
v.	FINAL FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER
PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	

This matter, the appeal of a $250 civil penalty for alleged emission of particulate matter in violation of respondent's Section 9.15(a) of Regulation I, having come on regularly for formal hearing on November 14, 1980, in Seattle, Washington, and appellant appearing by its attorney, George S. Martin, and respondent appearing by its attorney, Keith D. McGoffin, with Hearing Examiner William A. Harrison presiding, and the Board having considered the exhibits, records and files herein, and having reviewed the Proposed Order of the presiding officer mailed to the parties on the 29th day of

December, 1980, and more than twenty days having elapsed from said service; and

The Board having received exceptions to said Proposed Order and the Board having considered the exceptions and denying same, and being fully advised in the premises, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed Order containing Findings of Fact, Conclusions of Law and Order dated the 29th day of December, 1980, and incorporated by reference herein and attached hereto as Exhibit A, are adopted and hereby entered as the Board's Final Findings of Fact, Conclusions of Law and Order herein.

DATED this 10th day of March, 1981.

POLLUTION CONTROL HEARINGS BOARD

NAT W. WASHINGTON, Chairman

DAVID AKANA, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF MARINE POWER AND EQUIPMENT COMPANY, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 80-139 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a $250 civil penalty for alleged emission of particulate matter in violation of respondent's Section 9.15(a) of Regulation I, came on for hearing before the Pollution Control Hearings Board, William A. Harrison, Hearing Examiner, convened at Seattle, Washington, on November 14, 1980. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney, George S. Martin. Respondent appeared by its attorney, Keith D. McGoffin. Reporter Linda Erickson

EXHIBIT A

recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Respondent, pursuant to RCW 43.21B.260, has filed with this Board a certified copy of its Regulation I containing respondent's regulations and amendments thereto of which official notice is taken.

II

On June 16, 1980, respondent Puget Sound Air Pollution Control Agency (PSAPCA) received a citizen complaint concerning visible emissions into the air. Respondent's inspector went to the complainant's home located on Lake Union in Seattle, arriving just prior to 2:30 p.m. From the complainant's balcony, the inspector viewed across the one-half mile expanse of Lake Union, and observed the commercial ship repair facility of the appellant. This was known to the inspector because of prior visits to those premises.

He observed a densely occupied waterfront scene in which a number of good-sized commercial ships were nestled against the docks of appellant's facility. One of these, a tugboat, drew his attention because of the tan, billowing emission arising from it into the air high overhead. Through field glasses he determined that the emission arose from sandblasting work being conducted by an unidentified person on the tugboat.

III

Reasonable precautions to prevent particulate matter from becoming airborne during sandblasting include either tarp covering or water spray dampening. Neither of these precautions were being taken by the sandblastsing operator. Had tarping been used, the emissions would not have arisen as they did above the vessel. Had water spray been used, the emissions would have taken a bluish cast rather than the tan color seen by the inspector.

IV

These emissions were observed by the inspector for a fifty-five minute period during which they recurred intermittently. The tugboat from which the sandblast emissions arose remained in the same orientation to appellant's docks during this time. Appellant's ship repair facility includes work buildings, a large industrial crane, and a drydock all closely situated along the dock in question. The day in question was Monday, an ordinary working day. The emission in question would be as apparent to appellant's personnel, or more so, as it was to the complaining citizen and respondent's inspector one-half mile away.

V

The appellant received a Notice and Order of Civil Penalty from respondent citing violation of Section 9.15(a) of Regulation I, and assessing a $250 civil penalty. From this, appellant appeals.

VI

Any Conclusions of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The rule which respondent alleges to be violated, Section 9.15(a) of Regulation I states:

> (a) It shall be unlawful for any person to cause or permit particulate matter to be handled, transported or stored without taking reasonable precautions to prevent the particulate matter from becoming airborne. (Emphasis added.)

We now take up the elements of the offense.

II

"Cause or permit." Appellant urges that respondent's case should be dismissed or the penalty reversed because there was not proof that appellant owned or operated the tugboat or sandblasting operation causing the emission in question. We disagree. One of the prohibited acts is to "permit" the proscribed emissions. This, as shall be developed, does not require proof of ownership or operation of the offending process in certain circumstances.

Appellant urges next that on the proof presented, the tugboat was not shown to be anything but an interloper unassociated with appellant's facility. We disagree again. From the unchanging position of the tugboat, with bow nestled against appellant's dock, over the period of nearly an hour, we conclude that a line or some other fastening connected it to appellant's dock. We further conclude that this was done with appellant's consent as we cannot accept that the tugboat would be so long allowed to conduct sandblasting while occupying precious moorage space in that congested district without

appellant's consent.

The tugboat being moored to appellant's premises with appellant's consent on a normal working day with no showing that the premises were abandoned by appellant's personnel, and the emission from the sandblasting being openly and obviously apparent to those within or without the premises, and appellant adducing no evidence that it attempted to control the emissions or withdraw its consent for moorage, we conclude that appellant permitted the emissions in question. This is so regardless of whether appellant owned the tugboat or employed the sandblast operator. Likewise, this is so whether appellant's personnel actually saw the emission which, because it was open and apparent, they should have seen. The requirement of scienter established in PSAPCA v. Kaiser Aluminum 25 Wn. App. 273 (1980) was terminated by amendment to the Clean Air Act, chapter 70.94 RCW, effective four days prior to the facts of this case. Section 2, chapter 175, Laws of 1980.

III

"Particulate matter." Particulate matter is defined as "any material, except water in an uncombined form, that is or has been airborne and exists as a liquid or a solid at standard conditions." Section 1.07(w) of respondent's Regulation I. The emission in question, tan in color, was of particulate matter.

IV

"Without taking reasonable precautions." Where, as here, a party is shown to have permitted particulate matter to become airborne, a presumption arises that reasonable precautions were not taken. The

burden of proceeding with the evidence then shifts to that party (appellant) to show reasonable precautions. Boulevard Excavating, Inc. v. PSAPCA, PCHB No. 77-69 (1977), Weyerhaeuser Company v. PSAPCA, PCHB No. 1076 (1977) and Kaiser Aluminum Company v. PSAPCA, PCHB No. 1079 and 1085 (1977). Appellant failed to rebut that presumption which presumption was bolstered by the nonuse of tarps or water spray in connection with the sandblasting. Appellant permitted particulate matter to be handled without taking reasonable precautions to prevent it from becoming airborne, and therefore violated Section 9.15(a) of respondent's Regulation I.

V

Appellant has previously violated respondent's same rule by an abrasive blasting operation on a ship less than one year prior to this matter. Because of this the penalty assessed by respondent is fully justified.

VI

Any Findings of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The $250 civil penalty, No. 4759, is hereby affirmed.

DONE at Lacey, Washington, this 29th day of December, 1980.

POLLUTION CONTROL HEARINGS BOARD

William A. Harrison

WILLIAM A. HARRISON
Presiding Officer